UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RHINO NORTHWEST, LLC

and	**Case**	**19-CA-165356**
		19-CA-168813
		19-CA-169067
LOCAL NO. 15, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA AFL-CIO, CLC		**19-CA-181097**

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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INTRODUCTION

Respondent Rhino Northwest, LLC ("Respondent" or "Rhino"), by its undersigned counsel and pursuant to Rule 102.46 of the Board's Rules and Regulations, submits this brief in support of its contemporaneously-filed Exceptions to the Decision of Administrative Law John T. Giannopoulous ("ALJ"), dated November 3, 2017,[1] and filed in the above-captioned matter. The ALJ erred in concluding Respondent violated the Act by enforcing its 90-day deactivation rule, and by deactivating employees Travis Rzeplinski ("Rzeplinski") and Heidi Gonzalez ("Gonzalez"). Specifically, the ALJ erred in concluding that Respondent violated the Act when new management enforced its 90-day deactivation rule, which Respondent also enforced in the past. The ALJ's conclusions regarding enforcement of the 90-day rule are contrary to both NLRB precedent and the preponderance of the evidence. The ALJ also erred in failing to find whether any changes constituted material and substantial changes.

Furthermore, the preponderance of the evidence in the record does not support the ALJ's erroneous conclusion that Respondent deactivated Rzeplinski and Gonzalez based on animus for their union and protected activities, rather than their failures to accept sufficient work under Respondent's lawful 90-day deactivation rule. In doing so, the ALJ improperly placed the burden of proof on Respondent.

Consequently, the ALJ's findings that Respondent violated the Act are unsupported by the preponderance of the evidence and applicable law. As such, the findings should be reversed and the Complaint dismissed with prejudice.

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[1] Citations to the Administrative Law Judge's decision will be referenced as "ALJD" followed by the appropriate p. and line numbers. References to the hearing transcript will be referenced as "Tr. __." References to the General Counsel's, and Respondent's Exhibits appear respectively as "GC ___", and "R. ___". The Consolidated Complaint, as amended, Order Consolidating Cases, and Notice of Hearing will be referenced as "Compl." Charging Party Local No. 15, International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, AFL-CIO, CLC will be referred to as the "Union."

I. STATEMENT OF THE CASE

A. Background

Rhino Northwest, LLC, located in Fife, Washington, provides labor and production services to set up concerts, sporting events, trade shows, and corporate events. ALJD p. 2 lines 19-34. Rhino was started by Jeff Giek and it remains a family-owned business. (Tr. 459). Currently, Giek is President/CEO of Rhino Staging and a member of Rhino Northwest. (Tr. 458-59; GC. 27-28; R. 21-22).

Rhino employs a number of stagehands, including riggers. Due to the nature of the staging services industry, riggers and other stagehands do not have a set working schedule, and almost all of them work for multiple employers. This is because Rhino and other staging employers do not have enough work to keep them employed full-time. Consequently, riggers customarily work for many employers, often in the range of approximately 20 per year. ALJD p. 17 lines 13-14; p. 19 lines 22-23; p. 20 fn. 17. These riggers do not rely on Rhino as their sole source of income to maintain their livelihood. When work does become available, Rhino's schedulers call employees from a call list to see if they are available and willing to accept work. (Tr. 322-24, 330, 391). Each show or event requires a certain number of stagehands, including riggers, and the schedulers call employees from the call list until they get enough workers confirmed to work the show.

B. Union Organization

On May 26, 2015, the Union filed a petition with the Board seeking certification as the Section 9(a) representative in a unit consisting only of Rhino's riggers. (Compl. ¶ 5(a) and (b)). Region 19 conducted a pre-election representation hearing on June 4 and 5, 2015, in Case 19-RC-152947, to determine whether the petitioned-for unit was appropriate for the purposes of collective

bargaining. (Compl. ¶ 5(c)). Riggers Matthew Klemisch, Heidi Gonzalez, and Kyle Daley (who continues to work for Respondent) testified on behalf of the Union. ALJD p. 5 lines 2-3.

On June 18, 2015, the Board's Regional Director for Region 19 issued a Decision and Direction of Election ("DDE"), finding that the following employees of Respondent constituted an appropriate unit (the "Unit"):

> All full-time and regular part-time riggers, including boom lift riggers, ballroom riggers, decorating riggers, down riggers, ETCP high riggers, fly operators, head riggers, head fly operators, high riggers, high rigger trainees, high rigger welders, installation riggers, roof operators, roof supervisors, and rigging trainees, employed by the Employer out of the facility, excluding all other employees, guards and supervisors as defined by the Act.

(GC. 2).

On July 24, 2015, a Revised Tally of Ballots issued showing a majority of the Unit had designated and selected the Union as their representative for the purposes of collective bargaining with Respondent. (Compl. ¶ 5(f)). On August 3, 2015, the Acting Regional Director of Region 19 certified the Union as the collective bargaining representative for the Unit. (GC. 3). On December 17, 2015, the Board issued its Decision and Order adopting the Regional Director's unit determination. (Compl. ¶ 7(e)). On December 30, 2015, Respondent filed a Petition for Review before the United States District Court for the Fifth Circuit Court of Appeals asking the court to review the Board's Decision and Order, and arguing the invalidity of the Board's then-current unit appropriateness standard under *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934 (2011). That case was transferred to the United States Court of Appeals for the District of Columbia, which affirmed the Board's decision in *Rhino Northwest, LLC v. NLRB*, 867 F.3d 95 (D.C. Cir. 2017).

C. Rhino's 90-Day Deactivation Rule

Since December 2013, Rhino has maintained the following relevant language in its handbook's Employment Termination policy:

> When an employee's employment is terminated, he/she will be placed on the inactive call list and removed from the employee in good standing list. This means the employee will no longer be called to work any shifts for Rhino. Employees may be placed on the inactive call list for the following reasons, including but not limited: resignation, termination from employment, layoff, employees who do not return scheduling phone calls for a long period of time and/or consistently turn down work and/or call off shifts and ***employees who haven't worked a shift in any 90 day period will automatically be removed from our current employee in good standing list***.

(R. 1, p. 8; Tr. 390-91) (emphasis added). The purpose of this 90-day deactivation rule is to clean up the call list so that the schedulers do not spend time calling employees not likely to accept work (Tr. 333-34, 391, 414-15). Respondent deactivated employees long before the Union's campaign. ALJD p. 15 lines 19-23. In fact, the General Counsel's witness, Tyler Alexander, testified he was aware of the 90-day deactivation rule when he worked as Rhino's rigging manager from 2013-2015, and knew riggers had been deactivated under the rule before the Union campaign. ALJD p. 16 n.13.

In October 2015, Rhino hired Amber Peterson as an HR Coordinator. ALJD p. 16 lines 19-20. In addition to recruiting, onboarding, training, disciplining, and other human resources functions, Peterson is responsible for deactivating all employees under the Employment Termination policy. ALJD p. 16 lines 19-22. Starting November 3, 2015, Peterson undertook the task of going through the call list and deactivating people for the reasons stated in the Employment Termination policy. This task included deactivating riggers and other stagehands who had not worked in 90 days (as the policy states). ALJD p. 16 lines 22-32. Peterson explained her process:

> We have a call list of hundreds of employees. And so to keep that call list accurate, I request[ed] a report from IT. I currently run a

> report. And it essentially shows a name, a hire date and a last date worked. I then go into that employee's work history and see if they're currently scheduled. And if they're not currently scheduled or if they're not called for something, then I deactivate them and I make notes indicating that they simply have not worked in 90 days.

(Tr. 414).

Peterson deactivates all classifications of employees, both riggers and other stagehands. Peterson does not discuss whether to deactivate specific employees with anyone before removing them from the call list. (Tr. 412, 414). Since November 2015, Peterson has cleaned up the call list each month. (Tr. 391; R. 17; GC. 29). Now schedulers are using their time more efficiently by calling employees who are more likely to accept work. (Tr. 391, 415). It is noteworthy that neither the General Counsel nor the Union cross-examined Peterson and, therefore, her testimony stands undisputed.

Employees may be reactivated after indicating an interest in returning to work, but re-activation decisions turn on a variety of factors, including performance and past propensity to accept work. (Tr. 427).

D. Travis Rzeplinski Deactivated For Not Working In 90 Days

Rzeplinski last worked a call for Rhino on April 13, 2016. ALJD p. 18 lines 3-6. On July 15, 2016, Peterson deactivated him because he had not worked in 90 days. ALJD p. 19 lines 13-14. Peterson testified, without contradiction, that no one told her to deactivate Rzeplinski. (Tr. 432-33). Giek testified, without contradiction, that he had no involvement in whether Rzeplinski was called for shows or the decision to deactivate him. (Tr. 480, 484-85).

Rzeplinski communicated with Giek about the Union on two occasions. In one email dated June 18, 2015, following meetings in which Giek provided his contact information and invited questions, he asked questions about the election campaign. In that email, Rzeplinski said he was "currently leaning in favor of organizing." Giek responded to Rzeplinski's questions and

comments, and closed by telling him, "you are free to support a union if you want—that's your legal right." (GC. 17).

The next (and last) discussion he had with Giek was in January 2016. Rzeplinski asked Giek if they could meet in San Diego, California, where Giek lives. Giek said yes, and they met at a restaurant. ALJD p. 17 lines 41-42. Rzeplinski asked questions about the Union's status, and Giek responded that his hands were tied, so he was "staying out of it." ALJD p. 17 lines 42-45. During lunch, Giek and Rzeplinski talked at length about travel and sailing. (Tr. 479).

Sometime after April 13, 2016, Rzeplinski spoke with a scheduler over the phone and told her that he was "going to be out of town for some time in June into the beginning of July but otherwise [he] was available and wanted to work." ALJD p. 18 lines 38-40. After Rzeplinski said he was not going to be available, the schedulers did not call him. Rzeplinski testified that he called on or about July 6, 2016, and told an unidentified office employee he was available for work. ALJD p. 19 lines 1-4. The only other evidence of post-vacation communications of his interest in working is Rzeplinksi's testimony that he made informal statements at job sites to Rhino's supervisors, who are not schedulers, and who advised him to communicate with the office staff. (Tr. 279-82, 312-13).

Rzeplinski's decision to not work for Rhino for long stretches of time was fairly common. From June 1, 2014 to April 2016, Rhino called Rzeplinski a total of 87 times to see if he was available to work. (R. 20). He turned down, did not return the call, or failed to show up for work 59 times. The remaining 28 times over this 22-month period, he accepted the job, he was taken off the call, the call was canceled, or it was unknown why he did not work. (R. 20).

On July 15, 2016, Peterson deactivated 15 employees, including Rzeplinski, under the Employment Termination policy. (R. 17, p. 296-97).

E. Heidi Gonzalez Deactivated For Not Working In 90 Days

Gonzalez started working for Rhino in April 2010. ALJD p. 19 line 20. Following her testimony at the pre-election hearing, she was offered 28 calls and turned down 22 of them. (R. 19, pp. 13-16). The last job she worked was on August 2, 2015, after which Gonzalez turned down eight more jobs. (Tr. 160; R. 19, pp. 15-16).

On November 3, 2015, Peterson deactivated Gonzalez under the Employment Termination policy because she had not worked for 90 days. ALJD p. 20 lines 33-34. Peterson testified, without contradiction, that she did not know Gonzalez when she was deactivated (Tr. 430), and that no one directed Peterson to deactivate Gonzalez. (Tr. 432). Giek testified, without contradiction, that he did not tell anyone to keep Gonzalez off the schedule or to deactivate her. (Tr. 484-85). Gonzalez subsequently indicated a willingness to return to work, but was not re-activated due to a poor attitude toward Rhino's schedulers, her record of turning down job offers, and the presence of other more qualified riggers on the active call list. (Tr. 427-28).

Between June 1, 2014, and her pre-election hearing testimony on June 5, 2015, Rhino called Gonzalez 78 times offering her work. She "turned down" 46 of those calls (R. 19). As noted *supra*, after she testified at the pre-election hearing, Rhino called her 28 more times offering her work. Gonzalez "turned down" 22 of those calls. (R. 19). This high "turn down" rate indicates Gonzalez did not rely on Rhino for her livelihood and, more importantly, shows that schedulers often wasted their time calling her for work.

F. The Union's Unfair Labor Practice Charges

The Union filed five unfair labor practice charges against Respondent between October 2015 and July 2016 (Case Nos. 19-CA-165356, 19-CA-167275, 19-CA-168813, 19-CA-169067, and 19-CA-181097). The Union subsequently withdrew the charge in 19-CA-167275, as well as some allegations of the remaining charges. The remaining charges and allegations were

consolidated in the Complaint, as amended, in the instant matter. Respondent timely filed an Answer to the Complaint. A hearing was held before the ALJ on February 17-19, 2017. On November 3, 2017, the ALJ issued his Findings of Fact and Conclusions of Law. The ALJ erroneously concluded that Respondent violated Section 8(a)(1) and (3) of the Act by deactivating Rzeplinksi, Section 8(a)(1), (3), and (4) of the Act by deactivating Gonzalez, and Section 8(a)(1) and (5) of the Act by more strictly enforcing its 90-day deactivation policy. The ALJ correctly concluded that Respondent did not violate Section 8(a)(1), (3), and (4) of the Act by deactivating rigger Matthew Klemisch for violating its conflict of interest policy.

As discussed in detail *infra*, the Board should reject and reverse the ALJ's decisions regarding Rzeplinski, Gonzalez, and other riggers deactivated under the 90-day rule for numerous reasons. The ALJ's decisions, conclusions, and recommendations cannot be supported by any preponderance of the record evidence considered as a whole, and in many respects misstate and/or misapply established legal standards. For these reasons and all those discussed *infra*, the ALJ's decisions and recommendations should be overturned, and the Complaint should be dismissed in its entirety.

II. STANDARD OF REVIEW

Under *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951), the Board is to "base [its] findings as to the facts upon a de novo review of the entire record." *Id.* That same standard applies to the ALJ's legal conclusions and derivative inferences. *Id*. The "clear preponderance of the evidence" standard only governs Board review of an ALJ's credibility determinations. While an ALJ can consider all the evidence without directly addressing in the written decision every piece of evidence submitted by a party, an ALJ's factual findings *as a whole* must show that he or she "implicitly resolve[d]" conflicts created by all the evidence in the record. *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th

Cir. 1982); *NLRB v. Katz's Delicatessen of Houston St., Inc.*, 80 F.2d 755, 765 (2nd Cir. 1996) (an ALJ may resolve credibility disputes implicitly rather than explicitly where his "treatment of the evidence is supported by the record as a whole.").

The critical element in this standard is the phrase "on the record as a whole." The Board may not make its determination without taking into account contradictory evidence and evidence from which conflicting inferences could be drawn. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951). Rather, the Board must "take into account whatever in the record fairly detracts from [the] weight" of the ALJ's decision. *TNS, Inc. v. NLRB*, 296 F.3d 384, 395 (6th Cir. 2002) (quoting *Universal Camera Corp.*, 340 U.S. at 487). Stated another way, it is "not good enough" that the record contains *some* evidence that could have conceivably supported an ALJ's finding. The *Universal Camera* standard is not satisfied if the ALJ does not discuss, or even provide a citation, to that evidence. *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 514 (7th Cir. 2003) (citing *Scivally v. Sullivan*, 966 F.2d 1070, 1076 (7th Cir. 1992) (holding that "the ALJ must minimally articulate his reasons for crediting or rejecting" evidence)).

III. ISSUES AND EXCEPTIONS PRESENTED

A. Complaint ¶¶ 9; 11 – Enforcement of 90-Day Deactivation Rule

1. Respondent excepts to the ALJ's finding that enforcement of Respondent's 90-day deactivation rule was not consistent with its past practice. ALJD p. 29 line 31 – p. 30 line 18.

2. Respondent excepts to the ALJ's failure to find that the presence of new management is a valid justification for more consistent enforcement of a previously existing rule. ALJD p. 29 line 18 – p. 30 line 18.

3. Respondent excepts to the ALJ's failure to make any finding whether Respondent's enforcement of its 90-day deactivation rule constituted a material and

substantial change because it is contrary to applicable NLRB precedent. ALJD p. 29 line 18 – p. 30 line 18.

4. Respondent excepts to the ALJ's finding that a practice of deactivating employees because they have not worked in 90 days can constitute a unilateral change from a practice of deactivating employees because they "ha[ve]n't worked in a long time" or otherwise worked an insufficient amount of jobs. ALJD p. 29 line 18 – p. 30 line 18.

5. Respondent excepts to the ALJ's finding that Respondent's enforcement of its 90-day deactivation rule can constitute a unilateral change because the Union's underlying certification is based on the invalid unit appropriateness standard of *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934 (2011).

6. Respondent excepts to the ALJ's finding that Respondent's enforcement of its 90-day deactivation rule can constitute a unilateral change because such a finding impermissibly imposes a "discipline bar" on Respondent, as explained more fully in former Chairman Miscimarra's dissent to *Total Security Management, Inc.*, 364 NLRB No. 106 (2016), slip op. at **17-41. ALJD p. 29 line 18 – p. 30 line 18.

7. Respondent excepts to the ALJ's conclusion that Respondent violated Section 8(a)(1) and (5) by enforcing its 90-day deactivation rule because the preponderance of the evidence, much of which is not considered or addressed in the ALJD, does not support this conclusion. ALJD p. 16 line 19 – p. 17 line 6; p. 29 line 18 – p. 30 line 18.

B. Complaint ¶¶ 10(e, f); 12; 13 – The Respondent's Motivation for Deactivating Travis Rzeplinski and Heidi Gonzalez

8. Respondent excepts to the ALJ's imputation of knowledge of Union and protected activities to Respondent while disregarding undisputed evidence that the decision-

maker in Rzeplinski and Gonzalez's deactivations had no knowledge of their protected activities. ALJD p. 25 lines 15-30.

9. Respondent excepts to the ALJ's reliance on lawful comments regarding third-party customers' views on unionization as evidence of anti-Union animus. ALJD p. 25 line 33 – p. 26 line 6.

10. Respondent excepts to the ALJ's reliance on lawful comments regarding the legal requirement to maintain the status quo during bargaining as evidence of anti-Union animus. ALJD p. 26 lines 8-18.

11. Respondent excepts to the ALJ's reliance on lawful comments regarding other companies that have lost jobs or ceased doing business as evidence of anti-Union animus. ALJD p. 26 lines 20-26.

12. Respondent excepts to the ALJ's reliance on lawful comments regarding pre-election hearing testimony about work processes as evidence of anti-Union animus. ALJD p. 26 line 28 – p. 27 line 2.

13. Respondent excepts to the ALJ's reliance on lawful social media comments regarding terms and conditions of employment as evidence of anti-Union animus. ALJD p. 27 lines 4-9.

14. Respondent excepts to the ALJ's failure to consider that the absence of unlawful motives is shown by CEO Jeff Giek's affirmative order during a management meeting that Rzeplinski should continue to be scheduled for work without regard for possibly pro-Union sympathies. ALJD p. 17 lines 23-39.

15. Respondent excepts to the ALJ's reliance on comments made by individuals who played no role in the decisions to deactivate Rzeplinski and Gonzalez as evidence of unlawful motivations for those decisions. ALJD p. 25 line 33 - p. 27 line 11.

16. Respondent excepts to the ALJ's reliance on comments regarding hearing testimony as evidence of anti-Union animus motivating the discharge of Rzeplinski, who did not testify at the pre-election hearing. ALJD p. 26 line 28 – p. 27 line 2.

17. Respondent excepts to the ALJ's reliance on comments regarding Rzeplinski as evidence of anti-Union animus motivating Gonzalez's discharge. ALJD p. 27 lines 4-11.

18. Respondent excepts to the ALJ's reliance on lawful comments and actions as evidence to support a finding of anti-Union animus in the decisions to deactivate Travis Rzeplinski and Heidi Gonzalez because such a finding is contrary to Section 8(c) of the Act. ALJD p. 25 line 33 – p. 27 line 11.

19. Respondent excepts to the ALJ's failure to consider that the absence of unlawful motives is shown by the lack of any adverse action against employee Kyle Daley, who testified at hearing on behalf the Union. ALJD p. 5 lines 2-3.

20. Respondent excepts to the ALJ's failure to consider that the deactivations of Rzeplinski and Gonzalez were consistent with the high rate at which both employees declined work opportunities. ALJD p. 27 line 13 – p. 28 line 22.

21. Respondent excepts to the ALJ's failure to consider that the absence of unlawful motives is shown by the fact that Rzeplinski and Gonzalez were amongst many other employees deactivated for failures to accept sufficient work during late 2015 and early 2016. ALJD p. 29 lines 35-38.

22. Respondent excepts to the ALJ's inconsistent reliance on reactivations of some deactivated employees as evidence of disparate treatment, while failing to consider that other deactivated employees have not been reactivated. ALJD p. 27 lines 34-39.

23. Respondent excepts to the ALJ's application of the *Wright Line*, 251 NLRB 1083 (1980) framework in this case, in that the ALJ improperly placed the burden on Respondent to prove that Rzeplinski and Gonzalez were properly deactivated, and ignoring the burden on the General Counsel to show disparate treatment and that Respondent's reasons for its actions were pretext for anti-Union animus. ALJD p. 23 line 35 - p. 28 line 22.

C. Complaint ¶¶ 10(c-e); 12 – Deactivation of Travis Rzeplinski

24. Respondent excepts to the ALJ's failure to consider that the absence of unlawful motives is shown by Respondent's many job offers to Rzeplinski over the course of several months after his last Union activities of which Respondent had knowledge. ALJD p. 28 lines 4-10.

25. Respondent excepts to the ALJ's failure to consider that Rzeplinski's cordial and casual conversations regarding the Union with CEO Jeff Giek were unlikely to engender anti-Union animus. ALJD p. 9 lines 6-38; p. 17 line 41 – p. 42 line 6.

26. Respondent excepts to the ALJ's finding that Rzeplinski sought reactivation with sufficient clarity to conclude Respondent discriminated against him by failing to reactivate him. ALJD p. 18 line 32 – p. 19 line 16; p. 28 lines 4-22.

27. Respondent excepts to the ALJ's finding that Rzeplinski's deactivation violated Section 8(a)(1) and (3) because the ALJ ignored the preponderance of the evidence showing that Rzeplinski was deactivated solely due to his failure to accept sufficient work, and was not reactivated solely because he did not properly seek reactivation. ALJD p. 24 line 18 – p. 28 line 22.

D. Complaint ¶ 10(b, e, f); 12; 13 – Deactivation of Heidi Gonzalez

28. Respondent excepts to the ALJ's failure to consider that the absence of unlawful motives is shown by Respondent's many job offers to Gonzalez over the course of several months after her testimony at the pre-election hearing. ALJD p. 19 lines 20-34.

29. Respondent excepts to the ALJ's finding that unlawful motives and pretext are shown by Respondent's consideration of Gonzalez's poor treatment of schedulers in its decision not to reactivate her. ALJD p. 27 lines 38-46.

30. Respondent excepts to the ALJ's finding that testimony regarding Gonzalez's "bad attitude" towards schedulers constituted a "veiled reference" to protected activities. ALJD p. 27 lines 38-46.

31. Respondent excepts to the ALJ's finding that Gonzalez's deactivation violated Section 8(a)(1), (3), and (4) because the ALJ ignored the preponderance of the evidence that shows that Gonzalez was deactivated solely due to her failure to accept sufficient work, and was not reactivated due to her poor treatment of Respondent's schedulers and record of declining job offers. ALJD p. 24 line 20 - p. 28 line 2.

E. Proposed Remedies

32. Respondent excepts to the ALJ's proposed remedy that Respondent compensate Rzeplinski, Gonzalez, and any other bargaining unit employee due backpay, for any adverse tax consequence of receiving a lump-sum backpay award as prescribed in *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), because this remedy exceeds the Board's remedial authority. ALJD p. 31 lines 27-29.

33. Respondent excepts to the ALJ's proposed remedy that Respondent compensate Rzeplinski, Gonzalez, and any other bargaining unit employee due backpay, for search-for-work and interim employment expenses regardless of whether those expenses exceed

interim earnings, as prescribed in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), because this remedy exceeds the Board's remedial authority, as explained in former Chairman Miscimarra's dissent at slip op. **9-16. ALJD p. 31 lines 29-32.

34. Respondent excepts to the ALJ's proposed remedy that Respondent compensate Rzeplinski, Gonzalez, and any other bargaining unit employee due backpay with interest compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), because this remedy exceeds the Board's remedial authority. ALJD p. 31 lines 34-38.

35. Respondent excepts to the ALJ's proposed remedy that Respondent post Notices electronically as prescribed in *J. Picini Flooring*, 356 NLRB 11 (2010), because electronic posting is an extraordinary remedy, as explained in former Member Hayes' dissent at 356 NLRB 16-17. ALJD p. 32 lines 1-2.

36. Respondent excepts to the ALJ's proposed remedies because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's decision, does not support any such remedies. ALJD p. 31 line 8 – p. 32 line 2.

37. Respondent excepts to the ALJ's proposed Order because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's decision, does not support any such remedies. ALJD p. 32 line 7 – p. 34 line 2.

IV. ARGUMENT

A. Numerous Misapplications Of The Board's Unilateral Change Jurisprudence Produced The ALJ's Erroneous Conclusion That Respondent's Enforcement Of Its 90-Day Deactivation Rule Violated Section 8(a)(1) and (5) Of The Act.

1. The ALJ erred in finding that enforcement of Respondent's 90-day deactivation rule was not consistent with its past practice. ALJD p. 29 line 31 – p. 30 line 18.

The Board recently held:

> [R]egardless of the circumstances under which a past practice developed – i.e., whether or not the past practice developed under a collective bargaining agreement. . . an employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past.

Raytheon Network Centric Systems, 365 NLRB No. 161, slip op. at *16 (Dec. 15, 2017). The *Raytheon* Board further explained the context of this holding against the background of well-established precedent:

> Neither has the Board required bargaining prior to an employer's minor variations from actions taken in the past. "When changes in existing plant rules … constitute merely particularizations of, or delineations of means for carrying out, an established rule or past practice," it is lawful to continue applying the same rules without bargaining because the changes are not sufficiently "material, substantial, and significant to require notice and the opportunity to bargain." *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991); see *Trading Port, Inc.*, 224 NLRB 980, 983-984 (1976) (employer implemented no change that required bargaining when the employer applied its preexisting productivity standards, including penalties for failing to satisfy those standards, but "devised a more efficient means of detecting individual levels of productivity, of policing individual efficiency, and advanced a more stringent view towards below average producers than in the preceding 18 months or so.").

Id., slip op. at *8.

Raytheon is controlling here. The 90-day deactivation rule has been in place since 2013. ALJD p. 15 lines 6-12. As even the General Counsel's witness, Tyler Alexander, acknowledged, deactivations for failures to work sufficient jobs occurred long before the Union's organizing campaign. (Tr. 334, 335-36, 340; R. 17; GC. 29). Peterson maintained that rule, with "minor variations" that "do not materially vary in kind or degree from what has been customary in the past." Specifically, Peterson runs monthly reports to check work records against the policy, and she specifically refers to the rule in Respondent's internal records. (Tr. 391, 414; R. 17; GC. 29).

The ALJ conjures up a purported deviation from past practice by comparing prior management's less precise deactivation records with Peterson's records, arguing that these records show "[t]he number of employees deactivated for not having worked in a 90 day period increased almost 900 percent." ALJD p. 29 lines 33-40.

This statistic reveals nothing. It compares the ratio of deactivations prior to Peterson, whose records explicitly referred to failures to work (6.5%), to the ratio of such references under Peterson (56.3%). Buried within the denominators of both of those ratios, however, is conclusive evidence that Respondent maintained its past practice. Respondent deactivated a total of 246 employees during the six months prior to Peterson, and deactivated a total of 252 employees in the following six months. ALJD p. 29 lines 33-37. In other words, deactivations increased by only **2.4% overall** (6 ÷ 246), **and 1.1% in absolute terms** (45.1% deactivation rate before; 46.2% after). This increase is not statistically significant, but instead is attributable to random variation.[2] The fact that Peterson recorded virtually the same number of deactivations in a more precise manner certainly does not undermine the past practice that has been in place since 2013.

As a result, *Raytheon* and the longstanding Board precedent it rests upon require reversal of the ALJ's finding of a unilateral change violation.

2. <u>The ALJ erred in failing to find that the presence of new management is a valid justification for more consistent enforcement of a previously existing rule. ALJD p. 29 line 18 – p. 30 line 18.</u>

[2] A rough analysis of these figures confirms the increase in deactivations is not statistically significant. Rhino employs approximately 30-60 riggers and 500 stagehands. ALJD p. 3 lines 30-31. Using 545 as the number of employees, the six-month deactivation rate before Peterson was 246/545 = 45.1%, and the rate after Peterson was 252/545 = 46.2%. We can test the hypothesis that the increased deactivation rate was due to random chance using a "pooled two proportion z-test." That test requires first finding the mean ratio as 45.65%. The standard error is then the square root of: [.4565 x (1 - .4565)]/545 + [.4565 x (1-.4565)]/545, which equals .0302. That standard error leads to a P-value of .364, calculated as: [.462 - .451]/.0302. This P-value corresponds to the 64.2% percentile on a normal distribution scale (well within the range of statistically insignificant variations). **In other words, if the only changes in the deactivation rate were due to random fluctuations, rather than a change in practice, then we would expect the rate for any particular time period to meet or exceed Peterson's 46.2% rate more than one-third of the time.** Consequently, we can accept, at any confidence interval, the hypothesis that the observed change in the deactivation rate under Peterson resulted from random fluctuations. Consequently, the change was **not** statistically significant.

The Board's decision in *Wabash Transformer Corp.*, 215 NLRB 546 (1974), is on point and instructive regarding the ALJ's refusal to recognize the inevitable improvement in rule enforcement by new management personnel. In that case, the Board dismissed 8(a)(1) and (5) allegations where, pursuant to previously existent efficiency standards, the employer, for the first time, separately interviewed employees in default, and imposed the penalty of discharge as a means of enforcing productivity. In finding that the Act was not violated, the Board noted that the efficiency requirements predated union organization, while the new program reflected a more stringent approach to enforcing individual output.

The ALJ's half-hearted attempt to distinguish *Wabash* rings hollow. He argues that in *Wabash*, "the employer's productivity standards predated the union's certification and the employer 'actively enforced its rules.'" ALJD p. 30 lines 4-8. Elsewhere, however, he acknowledges that the 90-day deactivation rule here predated the union's certification, and that Respondent enforced the policy in the past. ALJD p. 29 lines 31-35. Nowhere does the ALJ explain why his characterization of Respondent's prior enforcement as "haphazard[]" in any way detracts from *Wabash*'s holding that new management can correct the issue. ALJD p. 30 lines 10-12. Furthermore, the ALJ did not address other cases leading to the same conclusion as *Wabash*.

Following *Wabash*, the Board in *The Trading Port, Inc.*, 224 NLRB 980 (1976), reached the same result after the General Counsel alleged the employer violated the Act by unilaterally instituting an employee evaluation system governing production quotas. The Board noted that although employee productivity enforcement was lax under one manager, productivity was not completely overlooked. *Id.* at 982. Citing *Wabash*, the Board held there was no violation of the Act when the new manager instituted a "more stringent approach" to productivity. *Id*. at 983.

The same analysis applies to this case. Here, the 90-day deactivation rule existed before any union organization. No new policy was implemented, and the Employment Termination policy has not changed in any way. Respondent's new Human Resources Coordinator simply did the job she was hired to do: consistently apply Respondent's existing policies. *See also Service Spring Co.*, 263 NLRB 812, 812-13 (1982) (affirming ruling that stricter enforcement of existing policies following a change in management does not violate Section 8(a)(5), and rejecting dissenting Member Jenkins' contention that a change in management is immaterial). Taken to its logical conclusion, the ALJ's position here would require Peterson to approach the Union and bargain for its permission to do her job by enforcing existing policies.

The ALJ's conclusion that new management cannot correctly enforce existing policies threatens to bind employers to the performance of since-replaced managers. This concept undermines the ability of employers to change management upon discovery of deficiencies and, thus, the very heart of managerial discretion. As a result, the ALJ's error must be reversed.

3. The ALJ erred in failing to make any finding whether Respondent's enforcement of its 90-day deactivation rule constituted a material and substantial change because it is contrary to applicable NLRB precedent. ALJD p. 29 line 18 – p. 30 line 18.

The Board requires Employers to bargain only over changes that have a "significant, substantial, and material impact on employees' terms and conditions of employment." *Edgar P. Benjamin Healthcare*, 322 NLRB 750, 752-753 (1996). Here, the ALJ failed to make any finding whatsoever regarding whether Respondent's enforcement of its 90-day deactivation rule constituted a material and substantial change. This failure represents a critical error because, for the reasons discussed *supra*, Respondent's enforcement was not material and substantial. Instead, it primarily resulted in more consistent and timely notations on Respondent's internal records, while Respondent deactivated almost exactly the name number of employees overall.

Consequently, the absence of a finding that Respondent's purported "change" was material and substantial requires reversal.

4. The ALJ erred in finding that a practice of deactivating employees because they have not worked in 90 days can constitute a unilateral change from a practice of deactivating employees because they "ha[ve]n't worked in a long time" or otherwise worked an insufficient amount of jobs. ALJD p. 29 line 18 – p. 30 line 18.

As discussed *supra*, the primary impact of Respondent's enforcement of its deactivation policy was more consistent internal recordkeeping. (R. 17). Although this recordkeeping issue has no practical impact on employees, the ALJ noted that Peterson consistently marks employees as "haven't worked in 90 days," whereas previous management's records "contain[] notations like 'hasn't worked in a long time,' 'hasn't worked in over a year [and] only worked one show,' or 'doesn't accept work.'" ALJD p. 16 lines 38-40.

The ALJ provides no explanation for why this difference in "notations" holds any legal significance. In fact, these records show prior management did enforce the rule, even if its recordkeeping was less precise. Like the management teams in *Wabash* and its progeny, Peterson merely fixed that issue, without materially or substantially impacting terms and conditions of employment, through more consistent management and recordkeeping practices.

5. The ALJ erred in finding that Respondent's enforcement of its 90-day deactivation rule can constitute a unilateral change because the Union's underlying certification is based on the invalid unit appropriateness standard of *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934 (2011).

The Board's decision to overrule *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934 (2011) in *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017) also necessitates that all of the Section 8(a)(5) allegations be dismissed.

As the ALJ noted, the Complaint alleges that Respondent independently violated Section 8(a)(5) of the Act by refusing to bargain with the Union. ALJD p. 29 fn. 29; Compl. ¶ 11. The

ALJD makes no explicit ruling on this allegation, noting only, "the Board has already ruled on these exact same allegations, finding a violation." *Id.*

The ALJ's finding of a Section 8(a)(5) unilateral change violation rests on the validity of the Board's certification of the Union under *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934 (2011). *See NLRB v. Katz*, 369 U.S. 736, 747 (1962) (finding that the duty to refrain from engaging in unilateral changes arises from the overall duty to bargain in good faith under Section 8(a)(5) of the Act); *Bath Iron Works*, 345 NLRB 499, 501 (2005) (explaining that unilateral change allegations focus on "a statutory right to bargain").

The Union's certification pursuant to the DDE in Case No. 19-RC-152947 (upheld in unpublished Board decision, Nov. 30, 2015), rested upon the *Specialty Healthcare* standard. (GC. 2). *See also Rhino Northwest, LLC*, 363 NLRB No. 72 (2015), enfd. 867 F.3d 95 (D.C. Cir. 2017). Respondent contended, and the Board has now agreed, that *Specialty Healthcare*'s invalid methodology caused the certification of bargaining units that were not appropriate for the purposes of collective bargaining under Section 9 of the Act. Absent such appropriateness, no statutory authority exists for a finding that Respondent violated Section 8(a)(5) of the Act in any manner.

The Board applies new standards retroactively unless doing so will cause a "manifest injustice." *Purple Communications*, 361 NLRB 1050, 1065 (2014), citing *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993). The three factors that it uses in making this determination are: "(1) the reliance of the parties on preexisting law; (2) the effect of retroactivity on accomplishment of the purposes of the Act; and (3) any particular injustice arising from retroactive application." *Machinists Local 2777 (L-3 Communications)*, 355 NLRB 1062, 1069 fn. 37 (2010). Here, the parties have not relied upon preexisting law, because no bargaining sessions have yet occurred. Retroactivity would accomplish the purposes of the Act by

encouraging consistent application of Section 9's unit appropriateness standard. Additionally, no particular injustice would be caused by retroactive application of the *PCC Structurals* standard. In fact, the Board would correct the injustice of an improperly-certified unit by refusing to find an unfair labor practice premised on that error.

Retroactive application is particularly appropriate here because the General Counsel brought unit appropriateness into issue by alleging an overall refusal to bargain in the Complaint. Compl. ¶ 11. As a result, the ALJ's finding of a Section 8(a)(5) violation based on enforcement of the 90-day deactivation rule must be reversed.

6. The ALJ erred in finding that Respondent's enforcement of its 90-day deactivation rule can constitute a unilateral change because such a finding impermissibly imposes a "discipline bar" on Respondent, as explained more fully in former Chairman Miscimarra's dissent to *Total Security Management, Inc.*, 364 NLRB No. 106 (2016), slip op. at **17-41. ALJD p. 29 line 18 – p. 30 line 18.

The practical impact of the ALJ's finding is that Respondent must bargain with the Union over every disciplinary action, whether or not issued pursuant to a pre-existing and previously enforced rule or policy. Failure to do so risks a *post hoc* finding that prior enforcement was too "haphazard[]" for the rule to now be enforced. ALJD p. 30 line 10. As Chairman Miscimarra explained in his *Total Security* dissent, such a "discipline bar" contradicts more than 80 years of Supreme Court and NLRB precedent on a wide variety of topics, exceeds the Board's statutory authority (particularly with regard to Section 10(c) of the Act), and imposes untenable obligations on employers. As Chairman Miscimarra explained at slip op. **39-41, this combination of factors results in indirect imposition of substantive contract terms upon employers, contrary to *H.K. Porter v. NLRB*, 397 U.S. 99 (1970). Consequently, the ALJ's finding of a unilateral change violation must be reversed in order to avert the imposition of an impermissible "discipline bar" upon Respondent.

7. The ALJ erred in concluding that Respondent violated Section 8(a)(1) and (5) by enforcing its 90-day deactivation rule because the preponderance of the evidence, much of which is not considered or addressed in the ALJD, does not support this conclusion. ALJD p. 16 line 19 – p. 17 line 6; p. 29 line 18 – p. 30 line 18.

As explained *supra*, the preponderance of the evidence and Board precedent establishes that the Employer's enforcement of its 90-day deactivation rule is consistent with its past practice, more consistent enforcement is permissible due to the presence of new management, no changes were material and substantial, and the ALJ's finding of a violation threatens to impose an impermissible "discipline bar" upon Respondent. As a result, the ALJ's erroneous finding of a unilateral change violation must be reversed.

B. The ALJ's Application Of The *Wright Line* Framework To The Rzeplinski And Gonzalez Deactivations Contained Multiple Errors Common To Both Allegations.

8. The ALJ erred in imputing knowledge of Union and protected activities to Respondent while disregarding undisputed evidence that the decision-maker in Rzeplinski and Gonzalez's deactivations had no knowledge of their protected activities. ALJD p. 25 lines 15-30.

The ALJ found "[t]here is ample evidence showing that Respondent knew about the union and protected activities engaged in by Gonzalez and Rzeplinski." ALJD p. 25 lines 17-18. He then describes knowledge possessed by CEO Jeff Giek, Regional Director for Operations Michelle Smith, supervisors Eric Drda and Dan Scolnik, and the presence of those four individuals and former Director of Operations Karen Biggers at the pre-election hearing. ALJD p. 25 lines 18-29. The ALJ fails to acknowledge, however, that there is no evidence whatsoever that the decision-maker in the Rzeplinski and Gonzalez deactivations, Human Resources Coordinator Amber Peterson, knew of any Union or protected activities by either employee.

In fact, Peterson testified without contradiction that she had never spoken to Gonzalez when Gonzalez was deactivated (Tr. 430), that she deactivated both employees solely because

their names appeared on a report showing they had not worked in 90 days (Tr. 425, 432), and that the decision to deactivate both employees was hers alone. (Tr. 432-33). Peterson did not even begin working for Respondent until October 5, 2015. ALJD p. 14 lines 29-30. She began working less than four months after the pre-election hearing and two months after the Regional Director certified the Union. Absent evidence that the decision-maker herself possessed knowledge of Rzeplinski's and Gonzalez's Union or protected activities, no *prima facie* case can be established under *Wright Line*, 251 NLRB 1083 (1980), enf'd 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *Gestamp S.C., LLC. v. NLRB*, 769 F.3d 254, 262 (4th Cir. 2014); *Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB*, 219 F.3d 677, 685 (7th Cir. 2000); *Pioneer Natural Gas v. NLRB*, 662 F.2d 408, 412 (5th Cir. 1981).

The ALJ's imputation of knowledge to Respondent generally, rather than examining the lack of knowledge possessed by the decision-maker, runs contrary to the Board's objective "to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees' employment." *Wright Line*, 251 NLRB at 1089. No such "causal relationship" can be shown without evidence that the actor who decided to impose the adverse action knew of the protected activities. Consequently, the ALJ's general imputation to Respondent of knowledge of union and protected activities by Rzeplinski and Gonzalez is reversible error.

9. The ALJ erred in relying on lawful comments regarding third-party customers' views on unionization as evidence of anti-Union animus. ALJD p. 25 line 33 – p. 26 line 6.

The ALJ found animus in CEO Giek's statement to employees that "it's no secret some of our clients want nothing to do with unions" and they "do not want us bringing a union into their venues or their shows." ALJD p. 25 lines 35-37. He cited *Blaser Tool & Mold Co., Inc.*, 196 NLRB 374, 374 (1972), in which the Board found unlawful a statement that customers might stop

doing business with the employer if employees unionized, emphasizing the absence of an objective factual basis for the statement. ALJD p. 25 lines 38-45.

Giek's statement here is plainly distinguishable from the assertion in *Blaser*. Giek referred only to client's *preferences*, and made no statement whatsoever regarding the potential for customers to cease doing business with Rhino. The Board has found lawful statements regarding customers' preferences, even when those statements *specifically mentioned the possibility of job loss*. For example, in *TNT Logistics North America, Inc.*, 345 NLRB 290 (2005), a contractor's statement that "Home Depot doesn't like the Union; that if the Union comes in we wouldn't have a job with Home Depot" was lawful because it expressed "an employer's belief as to demonstrably probable consequences beyond his control." *Id*. at 290 citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

Giek's statement also comports with cases such as *Manhattan Crowne Plaza Town Park Hotel Corp.*, 341 NLRB 619, 620 (2004), in which the Board found a mere reference to employment losses at other hotels lawful because it was "no prediction at all." *See also Stanadyne Automotive Corp.*, 345 NLRB 85, 89 (2005) (finding a reference to picket line violence at another employer to be "no prediction at all"). Giek's statement regarding customer's present preferences, without any reference to the future, cannot be construed as a "prediction" of job loss.

Furthermore, even incorrectly assuming an objective factual basis was required to support Giek's statement, such a basis was provided. As the ALJ noted, Giek prefaced his statement with "it's no secret…" ALJD p. 25 line 35. Riggers in the northwest region form a community of individuals who work alongside one another at a variety of jobs, for a variety of employers, throughout the area. ALJD p. 17 lines 13-14; p. 19 lines 22-23; p. 20 n.17. Giek, thus, provided an objective factual basis for customers' union-free preferences by invoking the common

knowledge shared within this community. As a result, the ALJ relied upon a lawful view on unionization as evidence of animus, contrary to Section 8(c) of the Act.

10. The ALJ erred in relying on lawful comments regarding the legal requirement to maintain the status quo during bargaining as evidence of anti-Union animus. ALJD p. 26 lines 8-18.

The ALJD's conclusion that statements regarding Rhino's responsibility to maintain the *status quo* during first contract bargaining demonstrated animus directly contradicts Board precedent regarding employers' obligations under Section 8(a)(5) of the Act. Although cases such as *Marathon Metallic Building Co.*, 224 NLRB 121 (1976) describe the status quo as "dynamic," in that regular or planned changes in terms and conditions of employment must continue, an employer may not make such changes absent a pattern or plan showing "reasonable certainty" that the changes would occur. *American Mirror Co.*, 269 NLRB 1091, 1094 (1984). Giek's use of the word "frozen," conveying that circumstances would remain preserved in their then-present state, is consistent with this standard.

Here, Respondent did not plan any changes in terms and conditions of employment prior to the organizing campaign, and no pattern or practice of granting changes such as wage increases existed. Consequently, Giek accurately explained to employees that terms and conditions of employment would be frozen during contract bargaining. *Southern Forest Products*, 229 NLRB 837 (1977) (ordering a hearing be held to determine "the Employer's practice, history, and/or policy concerning the granting of increases in wages and benefits" following employer's statement that wages and benefits would be frozen during bargaining). Accurate statements of law and facts cannot amount to implied threats. *Oxford Pickles*, 190 NLRB 109 (1971).

Moreover, the Board determined in *Tri-Cast*, 274 NLRB 377 (1985) that it will not find violations based upon employer statements forecasting the impacts of unionization, even if that forecast amounted to a misrepresentation of law. Relying upon its earlier declaration in *Midland*

National Life Insurance Co., 263 NLRB 127 (1982), that it would "no longer probe into the truth or falsity of the parties' campaign statements," the *Tri-Cast* Board found:

> The Employer's first comment is couched in terms of what might happen "*if* " certain events occur. We construe this comment as nothing more than the Employer's permissible mention of possible effects of unionization. Higher bids or customer feelings of dissatisfaction because of problems caused by union strikes *can* lead to lost business and lost jobs…Making these reasonable possibilities known to employees does not constitute objectionable conduct.

274 NLRB at 378 (emphasis in original).

Consequently, *Tri-Cast* requires a finding that Giek's statements regarding the *status quo* fell within the protection of Section 8(c) of the Act as lawful views on unionization.

11. <u>The ALJ erred in relying on lawful comments regarding other companies that have lost jobs or ceased doing business as evidence of anti-Union animus. ALJD p. 26 lines 20-26.</u>

The ALJ, citing no Board authority, viewed as evidence of animus a statement that, while Rhino "cannot predict the future, many companies have lost jobs or shut down after their employees unionized in the past." ALJD p. 26 lines 20-26. This finding of animus clearly contradicts longstanding black-letter Board law holding that employers may convey the effects of unionization elsewhere without making threats regarding their current situation. For example, in *Stanadyne,* the Board found lawful a sign depicting seven photographs of closed plants with this message: "These are just a *few* examples of plants where the UAW *used to* represent employees . . . Is this what the UAW calls job security?" 345 NLRB at 88 (emphasis in original). The Board, quoting *EDP Medical Computer Systems, Inc.*, 284 NLRB 1232, 1264 (1987), explained,

> [N]either the poster nor the employer's remarks suggested that the employer would close if the union came in, and that the employer had a "right to give employees information with respect to industry conditions, and was merely stating 'economic reality' by informing employees of these events. . .[T]he speeches and the 'closed' sign merely attempted to inform employees of the potential negative effects of their upcoming vote.

345 NLRB at 89.

Furthermore, Respondent's statement also began with a disclaimer stating it "cannot predict the future." As the *Stanadyne* Board acknowledged, such disclaimers bring employer statements even further within the protection of Section 8(c) of the Act. *Id*. at 88 n. 6, 89.

The ALJ's reliance on Respondent's reference to other companies in support of his finding of animus thus represents yet another contradiction of Section 8(c) of the Act.

12. The ALJ erred in relying on lawful comments regarding pre-election hearing testimony about work processes as evidence of anti-Union animus. ALJD p. 26 line 28 – p. 27 line 2.

The ALJ, citing no authority whatsoever, also relied on remarks by CEO Giek regarding the pre-election hearing testimony of Gonzalez, Matthew Klemsich, and Kyle Daley as evidence of animus. According to the ALJ, CEO Giek "was clearly mad at the content of the testimony that Rhino riggers gave." ALJD p. 26 lines 28-29. Giek's statements about that testimony, however, pertained to "Rhino's core values" rather than Union organizing or the decision to testify. ALJD p. 26 line 30 – p. 27 line 2. Specifically, these concerns arose from expressions by Gonzalez, Klemisch, and Daley that they did not believe in working as a team on job sites. ALJD p. 8 lines 34-37. If Giek was "mad" about anything, it was the apparent distortion of Rhino's work processes, rather than Union organization or Board testimony itself.

The Board examined similar comments regarding company values in *Stanadyne*. There, an agent of the employer "cited values that contributed to the Company's success, stating that he witnessed such values being sacrificed when the Union got involved[.]" 345 NLRB at 88. The Board did not find these statements unlawful. *Id.* at 89-90. Likewise, Giek's statements here pertained only to his views on the cooperative manner in which work should be performed, and do not show any animus toward union or protected activities. Consequently, his lawful views on the

potential effects of unionization on work processes are protected by Section 8(c) of the Act in the same manner as the other statements discussed *supra*.

13. The ALJ erred in relying on lawful social media comments regarding terms and conditions of employment as evidence of anti-Union animus. ALJD p. 27 lines 4-9.

Again citing no authority, the ALJ relied on a social media exchange between Rzeplinski and supervisor Dan Scolnik regarding purportedly unsafe working conditions as evidence of animus. ALJD p. 27 lines 4-9. Specifically, Scolnik stated that Rzeplinski had "a LOT of nerve" for raising these purported issues, while Rzeplinski himself had engaged in unsafe conduct. ALJD p. 27 line 7.

Nothing in this exchange could be construed as a threat of reprisal, promise of benefit, or any other unlawful statement, and the ALJ makes no such claim. Instead, this exchange represents precisely the type of discourse regarding terms and conditions of employment that the Act and the Board seek to promote. *See Purple Communications*, 361 NLRB at 1054-55 (2014); *Triple Play Sports Bar & Grille*, 361 NLRB 308, 312-13 (2014). Furthermore, Scolnik's comments expressed no ill will toward any protected activities, but only sought to highlight inconsistencies he perceived within this discussion. As a result, the Scolnik-Rzeplinski social media exchange falls with Section 8(c)'s protection.

14. The ALJ erred in failing to consider that the absence of unlawful motives is shown by CEO Jeff Giek's affirmative order during a management meeting that Rzeplinski should continue to be scheduled for work without regard for possibly pro-Union sympathies. ALJD p. 17 lines 23-39; p. 27 lines 9-11.

The final purported evidence of animus relied upon by the ALJ actually affirmatively shows that Respondent was *not* motivated by anti-Union animus. When Regional Director for Operations Smith suggested in a management meeting that rigging manager Tyler Alexander should not schedule Rzeplinski due to possibly pro-Union sympathies, CEO Giek immediately and

unequivocally directed that no such actions should occur. ALJD p. 17 lines 23-32. Specifically, he stated, "this did not need to be discussed, and that Alexander was doing what he was supposed to be doing by scheduling workers." ALJD p. 17 lines 30-32.

Giek himself oversees all operations as Respondent's founder, CEO, and President. ALJD p. 3 lines 1-2. There is no evidence that his subordinates disobeyed this order. Nonetheless, the ALJ focused on Smith's suggestion as evidence of animus, rather than Giek's express disavowal of such animus and his order that union sympathies not be considered. ALJD p. 27 lines 9-11. The ALJ's categorization of this conversation represents a clear error in his *Wright Line* analysis.

15. The ALJ erred in relying on comments made by individuals who played no role in the decisions to deactivate Rzeplinski and Gonzalez as evidence of unlawful motivations for those decisions. ALJD p. 25 line 33 - p. 27 line 11.

The ALJ attributes evidence of animus to CEO Giek, Director of Operations Smith, and supervisors Scolnik and Eric Drda. It is undisputed, however, that the decisions to deactivate Rzeplinski and Gonzalez were made solely by Human Resources Coordinator Amber Peterson. (Tr. 432-33). There is no evidence whatsoever that Peterson held animus against Rzeplinski and Gonzalez due to (or, as discussed *supra*, even knew about) their union or other protected activities. As a result, the ALJ erred by relying on purported evidence of animus held by individuals who played no role in the decisions to deactivate Rzeplinski and Gonzalez.

16. The ALJ erred in relying on comments regarding hearing testimony as evidence of anti-Union animus motivating the discharge of Rzeplinski, who did not testify at the pre-election hearing. ALJD p. 26 line 28 – p. 27 line 2.

The ALJ lists Giek's statements regarding hearing testimony as evidence of animus held against both Rzeplinski and Gonzalez. ALJD p. 26 line 28 – p. 27 line 2. Rzeplinski, however, was not amongst the three employees who testified at the pre-election hearing. ALJD p. 5 lines 2-

3. The ALJ thus erred by attributing this purported evidence of animus to Respondent's decision to deactivate Rzeplinski.

17. The ALJ erred in relying on comments regarding Rzeplinski as evidence of anti-Union animus motivating Gonzalez's discharge. ALJD p. 27 lines 4-11.

Similarly, the ALJ specifically states that supervisor Scolnik's social media conversation with Rzeplinski demonstrates "[a]nimus against the concerted activities of Rzeplinski **and Gonzalez**." ALJD p. 27 line 4 (emphasis added). He does not, however, cite as evidence of animus any statements made by, or directed toward, Gonzalez during that conversation. The attribution of animus against Gonzalez, based on Rzeplinski's conversation, constitutes error.

18. The ALJ erred in relying on lawful comments and actions as evidence to support a finding of anti-Union animus in the decisions to deactivate Travis Rzeplinski and Heidi Gonzalez because such a finding is contrary to Section 8(c) of the Act. ALJD p. 25 line 33 – p. 27 line 11.

Section 8(c) of the Act states,

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

As demonstrated *supra*, the ALJ used Respondent's "views, argument[s], [and] opinions" as evidence that Respondent committed unfair labor practices by deactivating Rzeplinski and Gonzalez. Meanwhile, Section 8(c) of the Act is not cited or considered anywhere within the ALJD. This approach violates Respondent's "statutory and First Amendment rights," and it is "obvious" that such statements cannot be used as evidence of unfair labor practices. *Outokumpu Stainless USA, LLC*, 365 NLRB No. 127, slip op. at *10 (Sept. 7, 2017) (Chairman Miscimarra dissenting).

The ALJ's findings regarding animus, and in turn his conclusions that the Rzeplinski and Gonzalez deactivations violated the Act, must be reversed if Section 8(c) of the Act is to have any force and effect.

19. The ALJ erred in failing to consider that the absence of unlawful motives is shown by the lack of any adverse action against employee Kyle Daley, who testified at the hearing on behalf the Union. ALJD p. 5 lines 2-3.

The ALJ acknowledged that, like Gonzalez, Daley testified at the pre-election hearing. ALJD p. 5 lines 2-3. He failed, however, to address Respondent's contention that the lack of any adverse action against Daley tends to show the lack of any unlawful motives. The General Counsel cannot explain why Respondent would have retaliated against Gonzalez for her testimony, while taking no adverse action against Daley.

The lack of any adverse action against Daley is significant to disparate treatment analysis. Gonzalez and Daley shared the same protected activities in testifying at the pre-election hearing. Respondent deactivated Gonzalez, but did not deactivate Daley. This difference in treatment arises from the only difference between the two riggers: Gonzalez repeatedly declined job offers and failed to work for 90 days, while Daley accepts job offers and has never triggered the 90-day rule. Daley's continued employment with Respondent is consequently highly probative of its lawful motives. The ALJ's failure to consider this fact is error.

20. The ALJ erred in failing to consider that the deactivations of Rzeplinski and Gonzalez were consistent with the high rate at which both employees declined work opportunities. ALJD p. 27 line 13 – p. 28 line 22.

As explained *supra*, both Rzeplinski and Gonzalez declined job offers at very high rates. Both individuals declined dozens upon dozens of job offers, resulting in significant wasted time for Respondent's schedulers. It is undisputed that Respondent's reactivation decisions are based on a variety of factors, including propensity to accept work. (Tr. 427). The ALJ's failure to

account for this striking characteristic of both Rzeplinksi's and Gonzalez's employment records consequently resulted in error.

21. The ALJ erred in failing to consider that the absence of unlawful motives is shown by the fact that Rzeplinski and Gonzalez were amongst many other employees deactivated for failures to accept sufficient work during late 2015 and early 2016. ALJD p. 29 lines 35-38.

The ALJ acknowledged that Peterson began running regular reports of employees who had not worked in 90 days in November 2015, and that she deactivated all such employees. ALJD p. 16 lines 19-32. In fact, he found 142 employees were deactivated for having not worked in 90 days between November 1, 2015 and April 30, 2016. ALJD p. 17 lines 1-3. The employees affected by the 90-day deactivation rule include both the riggers, who unionized, and the hundreds of other stagehands who did not. (R. 17).

The General Counsel cannot show disparate treatment under these circumstances. To the contrary, Respondent's treatment of Rzeplinski and Gonzalez was entirely consistent with its treatment of more than 140 other employees, whether represented by the Union or not. In fact, Respondent's practices would have been inconsistent only if it had *not* deactivated Rzeplinski and Gonzalez despite their appearances on Peterson's 90-day reports.

The ALJ's *Wright Line* inquiry should have focused on the "causal relationship" between Union activities and the deactivations. *Wright Line*, 251 NLRB at 1089. Such analysis would have shown the causes of Rzeplinski's and Gonzalez's deactivations were that they, like so many others, had not worked in 90-days. The ALJ's failure to acknowledge the significance of over 140 other deactivations, all for the same reason, is reversible error.

22. The ALJ erred in inconsistently relying on reactivations of some deactivated employees as evidence of disparate treatment, while failing to consider that other deactivated employees have not been reactivated. ALJD p. 27 lines 34-39.

The ALJ makes much of the fact that, "after Peterson was hired, multiple employees who were deactivated pursuant to the 90 day deactivation policy, were subsequently reactivated." ALJD p. 27 lines 36-38. He argues, "Respondent has not, and cannot, explained [*sic*] why it would reactivate other employees, but refused to reactivate Gonzalez." ALJD p. 27 lines 42-43.

To the contrary, Peterson clearly explained in her uncontradicted testimony that reactivation decisions depend on a variety of factors, including quality of work and the propensity to accept work. (Tr. 427). Furthermore, the ALJ's emphasis on employees who *were* reactivated ignores the many more employees who *were not* reactivated. The fact that reactivations occur on some occasions does not mean that all deactivated employees have a right to reactivation. In fact, in the vast majority of cases, no reactivation occurs. The ALJ's misplaced attempt to identify disparate treatment constitutes reversible error. *Kmart Corp.*, 320 NLRB 1179 (1996) (disparate treatment as between union supporters and opponents is fundamental to finding a Section 8(a)(3) violation); *GHR Energy Corp.*, 294 NLRB 1011, 1014 (1989) (no violation of Section 8(a)(3) where there was "no showing that the Respondent ever failed to take similar disciplinary action against any other employee" found to have violated the same rule).

23. The ALJ erred in applying the *Wright Line*, 251 NLRB 1083 (1980), framework in this case in a manner that improperly placed the burden on Respondent to prove that Rzeplinski and Gonzalez were properly deactivated, and ignoring the burden on the General Counsel to show disparate treatment and that Respondent's reasons for its actions were pretext for anti-Union animus. ALJD p. 23 line 35 - p. 28 line 22.

As described *supra*, the decision-maker in the Rzeplinski and Gonzalez deactivations possessed no knowledge of their Union or protected activities, all purported evidence of alleged animus is protected by Section 8(c) of the Act, and Respondent treated Rzeplinski and Gonzalez

consistent with its treatment of over 140 other employees. Additionally, as described *infra*, nothing about the timing of their deactivations suggests unlawful motives. Absent these errors, a proper *Wright Line* analysis could not result in the establishment of a *prima facie* case, nor could it avoid a finding that any *prima facie* case has been rebutted.

Furthermore, the ALJ's analysis throughout the ALJD demonstrates that he improperly placed the burden on Respondent to prove that its motives were proper, rather than placing the burden on the General Counsel to prove unlawful motives. *American Gardens Management Co*., 338 NLRB 644, 645 (2002) quoting *Wright Line*, 251 NLRB at 1089. For example, the ALJ found that a *prima facie* case had been established despite the lack of any direct evidence linking the deactivations to protected activities, instead relying on inferences that drew no such link.

Due to these errors and others discussed *supra*, both the Rzeplinski and Gonzalez deactivation determinations must be reversed.

C. Several Errors In The ALJ's Application Of The *Wright Line* Framework To Rzeplinski Contributed To The ALJ's Erroneous Conclusion That His Deactivation Violated Section 8(a)(1) and (3) of the Act.

24. The ALJ erred in failing to consider that the absence of unlawful motives is shown by Respondent's many job offers to Rzeplinski over the course of several months after his last Union activities of which Respondent had knowledge. ALJD p. 28 lines 4-10.

Rzeplinski engaged in some online union activities during the campaign in June 2015. ALJD p. 9 line 6 – p. 12 line 45. The only other arguable union activities he engaged in afterwards, of which Respondent was aware, took place during his lunch with Giek in January 2016. ALJD p. 17 line 41 – p. 18 line 2.[3] Nonetheless, Respondent continued to offer Rzeplinski work through

[3] The ALJ also describes, as factual background, an anonymous letter apparently authored by Rzeplinski regarding the discharge of supervisor Tyler Alexander, which was posted on Facebook by Klemisch in April 2017. ALJD p. 18 lines 8-30. The ALJ properly did not rely on this letter as evidence of protected activities. There is no evidence Respondent knew of the letter's existence, much less its author. Furthermore, protests regarding the managerial decision to discharge a supervisor, unconnected to terms and conditions of employment, are not protected. *Metro*

April 14, 2016. ALJD p. 18 lines 3-6. He thus continued to receive job offers for four months after his lunch with Giek, and for nearly ten months after his campaign activities. As a result, the timing of Rzeplinski's deactivation suggests no connection to union or protected activities. The ALJ's failure to consider the probative value of the deactivation's timing is error.

25. The ALJ erred in failing to consider that Rzeplinski's cordial and casual conversations regarding the Union with CEO Jeff Giek were unlikely to engender anti-Union animus. ALJD p. 9 lines 6-38; p. 17 line 41 – p. 42 line 6.

Relatedly, Rzeplinksi's most recent union activities were highly unlikely to engender animus. He and Giek met for a pleasant lunch at a Japanese restaurant in San Diego, hundreds of miles away from the northwest. ALJD p. 17 lines 41-42. Rzeplinski merely asked for an update on the Union and mentioned that work had slowed for him and Klemisch. ALJD p. 17 line 41 – p. 18 line 2. Giek provided non-committal responses, stating only that he was "staying out of it" and that he did not know anything about work assignments. ALJD p. 17 line 44 – p. 18 line 2. Otherwise, the pair discussed topics such as sailing. (Tr. 479). Any reliance on this conversation as evidence of unlawful motives by the ALJ constitutes error because such an innocuous conversation is highly unlikely to engender animus.

26. The ALJ erred in finding that Rzeplinski sought reactivation with sufficient clarity to conclude Respondent discriminated against him by failing to reactivate him. ALJD p. 18 line 32 – p. 19 line 16; p. 28 lines 4-22.

Rzeplinski, an employee who frequently turned down Respondent's job offers, informed Respondent in approximately May 2016 that he would be out of town for a significant period of time. (Tr. 267). Upon his return, he vaguely claims to have made only two attempts to inform Respondent's office staff he was available for work. ALJD p. 18 line 37 – p. 19 line 4. Otherwise,

Transport LLC, 351 NLRB 657, 661–62 (2007); *Singer Co.*, 256 NLRB 989 (1981); *Puerto Rico Food Prod. Corp.*, 619 F.2d 153 (1st Cir. 1980).

Rzeplinski only made informal statements at job sites, while working for another company, to Rhino's supervisors. These supervisors are not schedulers, and so they advised him to communicate with the office staff. (Tr. 279-82, 312-13).

Nonetheless, the ALJ characterized Rzeplinski's two purported contacts with the office staff, who manage hundreds of employees, as sufficient to indicate a willingness to work, such that any failure to schedule him showed unlawful motives. ALJD p. 18 line 37 – p. 19 line 4. The ALJ also described supervisors in the field as "[giving] him the brush off," despite their non-scheduling roles. ALJD p. 19 lines 9-11. Consequently, the ALJ erroneously found that the failure to reactivate Rzeplinski resulted from unlawful motives, when the preponderance of the evidence suggests he failed to request reactivation with sufficient clarity.

27. The ALJ erred in finding that Rzeplinski's deactivation violated Section 8(a)(1) and (3) because the ALJ ignored the preponderance of the evidence showing that Rzeplinski was deactivated solely due to his failure to accept sufficient work, and was not reactivated solely because he did not properly seek reactivation. ALJD p. 24 line 18 – p. 28 line 22.

As described *supra*, the multiple errors in the ALJ's *Wright Line* analysis of both the Rzeplinski and Gonzalez deactivations require reversal of both findings. Additionally, the errors related to Rzeplinski's many job offers after his Union activities, the innocuous timing of his deactivation, and the lack of clarity with which he sought reactivation all further undermine the General Counsel's ability to establish a *prima facie* case and avoid Respondent's strong rebuttal defense. Due to these errors, the ALJ's finding that Respondent violated the Act by deactivating Rzeplinski must be reversed.

D. Several Errors In The ALJ's Application Of The *Wright Line* Framework To Gonzalez Contributed To The ALJ's Erroneous Conclusion That Her Deactivation Violated Section 8(a)(1), (3), and (4) of the Act.

28. The ALJ erred in failing to consider that the absence of unlawful motives is shown by Respondent's many job offers to Gonzalez over the course of several months after her testimony at the pre-election hearing. ALJD p. 19 lines 20-34.

There is no evidence Gonzalez engaged in any union or protected activities after the pre-election hearing and Union campaign of June 2015. ALJD p. 19 lines 20-28. Respondent continued offering her work long after those activities. In fact, after her last job on August 2, 2015, she turned down eight consecutive job offers. (Tr. 160; R. 19, pp. 15-16). In total, Respondent offered Gonzalez 28 jobs after her hearing testimony, and she turned down 22 of those offers. (R. 19, pp. 13-16).

The General Counsel cannot explain why, if it held animus against Gonzalez's protected activities, Respondent would have offered Gonzalez 28 jobs after her hearing testimony. As a result, the timing of Gonzalez's deactivation suggests no connection to protected activities. The ALJ's failure to consider the probative value of her deactivation's timing was thus error.

29. The ALJ erred in finding that unlawful motives and pretext are shown by Respondent's consideration of Gonzalez's poor treatment of schedulers in its decision not to reactivate her. ALJD p. 27 lines 38-46.

The ALJ fails to acknowledge the undisputed fact that Respondent's reactivation decisions account for the totality of the circumstances in each individual case. (Tr. 427). It is also undisputed that Gonzalez exhibited a poor attitude toward Respondent's schedulers, and other riggers with better attitudes were available. (Tr. 427-28). Furthermore, as discussed *supra,* she turned down job offers at an extremely high rate. Relying solely on the fact that Respondent reactivated some other employees on some other occasions, the ALJ found these legitimate business reasons pretextual. ALJD p. 27 lines 34-46. This determination represents an emblematic example of an

ALJ erroneously substituting his business judgment for the employer's. *See Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004); *Aero Detroit, Inc.*, 321 NLRB 1101, 1105 (1996).

30. The ALJ erred in finding that testimony regarding Gonzalez's "bad attitude" towards schedulers constituted a "veiled reference" to protected activities. ALJD p. 27 lines 38-46.

The ALJ, quoting *Children's Studio School Pub. Charter School*, 343 NLRB 801, 805 (2004), viewed Peterson's testimony regarding Gonzalez's attitude as a "veiled reference to the employee's protected activities." This attribution of animus misses the mark by a wide margin for three reasons.

First, as discussed *supra*, there is no evidence that Peterson even know about Gonzalez's union or protected activities when she deactivated Gonzalez, or when Peterson declined to reactivate her.

Second, Peterson's "bad attitude" testimony described Gonzalez's conduct towards Respondent's *schedulers*, not toward her co-workers or to management. (Tr. 427-28). The only contact between riggers and schedulers occurs during work assignment calls. It is legally and factually impossible for a rigger such as Gonzalez to engage in protected activities with schedulers during these calls.

Third, the reference to Gonzalez's attitude only emphasized the need for workplace civility. As the Board has recently explained, expectations that employees act civilly and with respect toward their co-workers arise from "common-sense standards of conduct that advance substantial employer and employee interests." *The Boeing Company*, 365 NLRB No. 154, slip op. at *4 n. 15 (Dec. 14, 2017). The ALJ's erroneous finding that the reference to Gonzalez's attitude toward schedulers shows unlawful motives contradicts the Board's holding in *Boeing*.

As a result, the ALJ's misinterpretation of Peterson's legitimate reasons for refusing to reactivate Gonzalez constitutes reversible error.

31. The ALJ erred in finding that Gonzalez's deactivation violated Section 8(a)(1), (3), and (4) because the ALJ ignored the preponderance of the evidence that shows that Gonzalez was deactivated solely due to her failure to accept sufficient work, and was not reactivated due to her poor treatment of Respondent's schedulers and record of declining job offers. ALJD p. 24 line 20 - p. 28 line 2.

As described *supra*, the multiple errors in the ALJ's *Wright Line* analysis of both the Rzeplinski and Gonzalez deactivations require reversal of both findings of violations. Additionally, the errors related to Gonzalez's many job offers after her union activities, the innocuous timing of her deactivation, and her poor treatment of schedulers, all further undermine the General Counsel's ability to establish a *prima facie* case and avoid Respondent's strong rebuttal defense. Due to these errors, the ALJ's finding that Respondent violated the Act by deactivating Gonzalez must be reversed.

E. The ALJ's Proposed Remedies And Recommended Order Are Erroneous Because The Proposed Remedies Exceed The Board's Remedial Authority, And Because Respondent Did Not Violate The Act.

32. The ALJ erred in proposing that Respondent compensate Rzeplinski, Gonzalez, and any other bargaining unit employee due backpay, for any adverse tax consequence of receiving a lump-sum backpay award as prescribed in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), because this remedy exceeds the Board's remedial authority. ALJD p. 31 lines 27-29.

The Board's authority to grant relief is limited to remedial relief. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940), citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938); *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267-68 (1938). It is not authorized to require punitive relief. *Consolidated Edison*, 305 U.S. at 235-36; *Alamo-Rent-A-Car*, 362 NLRB No. 135, slip op. at *7 (2015) (Chairman Miscimarra, concurring in part and dissenting in part).

The ALJ's proposal that Respondent compensate employees for "adverse tax consequence[s] of receiving a lump-sum backpay award" encroaches upon punitive grounds. The

objective of backpay is to replace wages the employee lost. Once an employer has made such a replacement, its obligation is satisfied. The Act lends no support to the *AdvoServ* theory that an offending employer "caused" adverse tax consequences. Such an employer exercises no control over the Internal Revenue Code. Furthermore, in compliance proceedings, an employee concerned about tax consequences may negotiate an installment payment plan if he or she finds such a plan advantageous.

As a result, the ALJ's proposal that Respondent compensate employees for adverse tax consequences must be reversed.

33. The ALJ erred in proposing that Respondent compensate Rzeplinski, Gonzalez, and any other bargaining unit employee due backpay, for search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings, as prescribed in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), because this remedy exceeds the Board's remedial authority, as explained in former Chairman Miscimarra's dissent at slip op. **9-16. ALJD p. 31 lines 29-32.

Similarly, the ALJ's proposal that Respondent compensate employees under *King Soopers* for search-for-work and interim employment expenses, regardless of whether those expenses exceed interim earnings, exceeds the Board's remedial authority. As Chairman Miscimarra explained in that case, the *King Soopers* approach produces a windfall in certain cases, creates a substantial risk of protracted litigation, and is inconsistent with the practices of other agencies under other employment statutes.

Moreover, such a remedy in this industry, where employees work for many employers during the year, defies common sense. Employees are always searching for work due to the nature of the industry. Respondent's deactivations of Rzeplinski and Gonzalez had no impact on their searches. This aspect of the ALJ's proposed remedies should thus be reversed.

34. The ALJ erred in proposing that Respondent compensate Rzeplinski, Gonzalez, and any other bargaining unit employee due backpay with interest compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), because this remedy exceeds the Board's remedial authority. ALJD p. 31 lines 34-38.

The requirement that interest on backpay be compounded daily under *Kentucky River* further exceeds the Board's remedial authority. Daily interest compounding is unavailable in most private investments. Consequently, the *Kentucky River* standard causes backpay to grow far faster than it would grow if employees had never lost the earnings, thus creating a punitive result for employers. The Board should therefore reverse *Kentucky River*, and the ALJ's proposed daily compounding of interest.

35. The ALJ erred in proposing that Respondent post Notices electronically as prescribed in *J. Picini Flooring*, 356 NLRB 11 (2010), because electronic posting is an extraordinary remedy, as explained in former Member Hayes' dissent at 356 NLRB 16-17. ALJD p. 32 lines 1-2.

As Member Hayes explained in *J. Picini Flooring*, electronic notices create unnecessary risks of electronic alterations, impose inconsistent obligations on employers, and are otherwise contrary to the remedial purposes of the Act. Such extraordinary remedies should only be imposed where unusual circumstances dictate their necessity. There is no evidence of any such unusual circumstances here. As a result, Respondent should not be required to post electronic notices as proposed by the ALJ.

36. The ALJ erred in proposing remedies because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's decision, does not support any such remedies. ALJD p. 31 line 8 – p. 32 line 2.

For all of the reasons discussed *supra*, the ALJ committed numerous errors requiring reversal of his findings. Respondent's enforcement of its 90-day deactivation rule does not constitute a unilateral change, and it did not retaliate against Rzeplinski or Gonzalez for union or

other protected activities. Consequently, the ALJD should be reversed in its entirety, and the Complaint dismissed with prejudice.

37. The ALJ erred in proposing an Order reflecting violations of the Act because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's decision, does not support any such remedies. ALJD p. 32 line 7 – p. 34 line 2.

The ALJ's proposed Order is inappropriate insofar as no violations of the Act occurred, as explained in detail *supra*.

V. CONCLUSION

The record evidence reflects that the General Counsel did not satisfy its burden to show that Respondent violated the Act, and its claims cannot be sustained. As Respondent's exceptions reveal, the ALJ made numerous errors in concluding to the contrary. For these and all of the reasons discussed above, Respondent's exceptions should be granted, the findings and conclusions of the ALJ to which Respondent excepted should be overturned, the Board should conclude that no violations of the Act occurred, and the Complaint should be dismissed in its entirety with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2017, the foregoing was filed with the NLRB's Office of Executive Secretary/Board via the NLRB's electronic filing system and copies of the foregoing Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Decision were served via electronic mail to the following:

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